COURT OF APPEALS, STATE OF COLORADO
Consolidated Case Nos.: 94CA1445, 94CA1468 and 94CA1976

Appeal from the District Court of Jefferson County, Colorado
Case No.: 90-CV-3966, Division 9
Honorable Tom Woodford, Judge

REPLY BRIEF
OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS ASOMA AND JUMBO

WESTERN STATES MINERALS CORPORATION,
a Utah corporation,

Plaintiff-Appellant,

V.

ASOMA (UTAH), INC., a Delaware corporation, JUMBO MINING COMPANY, an unincorporated association, ED B. KING, a/k/a E.B. KING, and JANET KING,

Defendants-Appellees.

DONALD A. DEGNAN, ESQ.
NO. 20774
HOLLAND & HART
1050 WALNUT STREET, SUITE 500
BOULDER, CO 80302-5144
TELEPHONE NO.: 303-473-2715
TELEFAX NO.: 303-473-2720

Z. LANCE SAMAY
ATTORNEY AT LAW
A PROFESSIONAL CORPORATION
ONE WASHINGTON STREET
POST OFFICE BOX 130
MORRISTOWN, NJ 07963-0130
TELEPHONE NO.: 201-540-1133
TELEFAX NO.: 201-540-1020
ATTORNEYS FOR APPELLEES/CROSS-APPELLANTS ASOMA AND JUMBO

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Appendix 1: Phase One trial Exhibit Y-2. The Fax Transmittal Coversheet by which Mr. King telefaxed to Buck Morrow his letter of September 19, 1988 (Phase One trial Exhibit Z-2) requesting a renegotiation of the purchase price or an avoidance of the Contract based, in part, upon his due-diligence discovery of Western's illegal construction and operation of six gold ore leach heaps.

Appendix 2: Phase One trial Exhibit Z-2.

Appendix 3: Phase One trial Exhibit A-3. Western's Fax Transmittal Coversheet by which Buck Morrow telefaxed to Mr. King, Western's accompanying response to Mr. King's letter of September 19, 1988 (Phase One trial Exhibit Z-2). The response set forth in a letter dated September 21, 1988 rejects Mr. King's requests and advises him, **"We recommend adhering to the terms of our agreement as originally written."**

Appendix 4: Phase One trial Exhibit B-3. The Fax Transmittal Coversheet by which Mr. King telefaxed to Buck Morrow his accompanying letter of September 23, 1988, in which he reiterated his earlier request to renegotiate the purchase price or to avoid the Contract and urged Western to reconsider its earlier decision.

Appendix 5: Phase One trial Exhibit C-3. Western's Fax transmittal Coversheet by which Buck Morrow telefaxed to Mr. King, Western's accompanying response to Mr. King's letter of September 23, 1988 (Phase One trial Exhibit B-3). The response set forth in a letter dated September 23, 1988 reiterated the position that Western had taken in Mr. Morrow's letter of September 21, 1988.

PRELIMINARY STATEMENT

This appeal involves intertwined findings of law and fact regarding an integrated option contract ("the Contract") for the purchase of the Drum Mine. The Contract was comprised, among other documents, of an Option Agreement dated June 30, 1988 and an attached Quitclaim Deed. The Quitclaim Deed was later to be used as a closing document on October 12, 1988 for the conveyance of the Drum Mine from Western to Asoma. The trial court determined that, given its factual findings, the reformation of Paragraph 3 of the Quitclaim Deed -- the provision of the Contract by which Western retained reclamation liability for the Drum Mine, was legally appropriate on the ground that Western had made a unilateral mistake in drafting the Contract.

Although Asoma maintains that some of the trial court's factual findings were clearly erroneous, the trial court's legal conclusions are flawed, based on its own record. The trial court's reformation order should be vacated because: (1) the trial court did not find any fraud or inequitable conduct to support a reformation premised upon unilateral mistake; (2) it was never established that Asoma had knowledge of the supposed "mistake" prior to the execution of the Contract; (3) Asoma specifically advised Western of the "mistaken" provision well in advance of closing; and (4) Western reaffirmed the Contract after Asoma's specific reference to the contested provision.

Moreover, reformation of the Contract should be barred by Western's extreme negligence in independently drafting and repeatedly reviewing the Contract. In addition, reformation should

be barred by Western's waiver which resulted, in part, from Western's acceptance of the benefits of the Contract. Lastly, the issue of reformation should not even have been considered by the trial court because of the Contract's expressed supercessionary clause and Colorado's policy of giving such clauses full force and effect.

With a view toward assisting this Court in analyzing a factually complex and arduously lengthy record, it should be noted that Western has persistently misrepresented the record and the trial court's findings of fact and has incorrectly recited the governing law, with rare exception, throughout its briefs. Western has even gone so far as to fabricate "findings of fact" that the trial court never made. (See Western's Answer-Reply Brief ("WARB") at 19). For example, the trial court never found that Asoma had acted inequitably in participating in the closing of the Drum Mine transaction on October 12, 1988, nor did it make any findings of fact or conclusions of law adverse to Asoma's defense that Western had incontestably waived its claimed entitlement to reformation.

Also contrary to Western's assertions, Asoma has not "conceded that [it] breached the reformed contract and that relief in the form of specific performance was proper." (WARB at 3). Asoma has consistently maintained that the trial court erred when it reformed the Contract, i.e., when it reformed the so-called mistake in Paragraph 3 of the Quitclaim Deed of the Option Agreement made on June 30, 1988, and that its Judgment of Reformation should be reversed. Asoma's attack upon the trial court's Judgment of

Reformation contests all adverse judgments of the trial court that are based upon reformation, including without limitation, breach of contract, specific performance and the award of costs. These adverse rulings must necessarily be vacated if this Court agrees that the trial court's reformation of the Contract was inappropriate. This is so because all of the trial court's adverse rulings regarding those issues are unqualifiedly contingent upon its underlying, clearly erroneous ruling regarding reformation.

I. THE TRIAL COURT'S FACTUAL FINDINGS ARE INSUFFICIENT TO SUPPORT A LEGAL CONCLUSION FAVORING REFORMATION.

1. The trial court did not find fraud or inequitable conduct.

In order to defeat Asoma's appeal, Western must demonstrate, among other requirements, that the trial court properly found as a fact that Asoma had perpetrated a fraud or acted inequitably in the making of the Contract that was executed by the parties on June 30, 1988. See Boyles Bros. Drilling v. Orion Ind., 761 P.2d 278, 281 (Colo. Ct. App. 1988); see also the discussion of this issue beginning at pages 24 and 32 of Asoma's Opening Answer Brief ("AOAB"). The trial court never made such a finding of fact, properly or otherwise, nor did it make any other findings of fact from which such fraud or inequitable conduct could be inferred. Indeed, the record cannot support any such finding. That being so, the trial court's reformation of the Contract was reversible error as a matter of law. See Boyles Bros., 761 P.2d at 281; Smith v. Whitlow, 129 Colo. 239, 268 P.2d 1031 (1954) (en banc); Muchow v. Central City Gold Mines Co., 100 Colo. 58, 62, 65 P.2d 702, 704

(1937); accord Hall v. Hall, 681 P.2d 543, 545 (Colo. Ct. App. 1984).

The Quitclaim Deed was an integral, complete and contemporaneous part of the Contract. See Harty v. Hoerner, 170 Colo. 506, 509, 463 P.2d 313, 314 (1969) (where an instrument contains an express reference to a contemporaneous agreement, the agreement is thereby made a part of the contract sued upon, and the documents must be construed together); Bledsoe v. Hill, 747 P.2d 10, 12 (Colo. Ct. App. 1987); see also Aronoff v. Western Federal S & L Ass'n., 28 Colo. App. 151, 154-55, 470 P.2d 889, 891 (1970). And the Contract, including the so-called mistake in the language of Paragraph 3 of the Quitclaim Deed that would later be reformed by the trial court, became final and irrevocably binding upon Western at the time that the Contract was executed on June 30, 1988. See Shull v. Sexton, 154 Colo. 311, 316, 390 P.2d 313, 316 (1964)(an option founded upon a consideration is a unilateral contract which is obligatory on the optionor). In fact, the Contract itself specifically required Western and Asoma to execute the Quitclaim Deed at closing in exactly the same form in which it was annexed to the Contract. (Ex. 2 at 3).

Applying these basic principles of law, it is clear that, although the Contract did not become mutually enforceable until Asoma exercised its option on September 28, 1988, Western, the optionor, was, nonetheless, irrevocably bound to the precise terms as agreed upon by the parties and as fully integrated in the Contract of June 30, 1988. Where, as here, in the absence of a

clear and unequivocal showing that Asoma had perpetrated a fraud or engaged in inequitable conduct **before** the execution of the Contract on June 30, 1988, reformation based upon unilateral mistake must fail as a matter of law. See Boyles Bros., 761 P.2d at 281.

Western tries disingenuously[1] to sidestep this fatal error of the trial court by asserting, albeit without factual or legal justification, and certainly without legal effect, that the trial court found as a fact that Asoma had acted inequitably in "closing the deal" on October 12, 1988 (WARB at 18), i.e., that Asoma had acted inequitably in executing the Quitclaim Deed that had been prepared solely by Western's attorneys and legal advisors and presented by Western to Mr. King as an integral part of the June 30, 1988, Contract. (TI:9-6 to 21; TI:149-7 to 11; TI:156-18 to 20; TI:202-4 to 15; TI:751-14 to 22). Once again, even if such a contention were legally relevant, as it certainly is not, the record is clear that the trial court made no such finding.

The closest that the trial court came to even hinting at inequitable conduct on the part of Asoma was in the "Conclusions of Law" of the trial court's Phase One Opinion, under the heading of "Negligence." (POO at 6). There, the trial court noted as

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[1] By a tortuous process of cutting, pasting and fabricating, at page 19 of its Answer-Reply Brief, Western blatantly misrepresents as a specific fact finding of the trial court, in block quotes no less, an out-of-context, inaccurate and grossly misleading jumble of snippets of the trial court's Phase One Opinion, interspersed with a combination of improper ellipsis and Western's own inaccurate and misleading language. Although Western would like to pass this contrivance off as a fact finding of the trial court, it is clear from both the Phase One and Phase Two Opinions, that the trial court never made such a finding.

"instructive" an incorrectly invoked legal theorem, namely, Comment e. of § 161 of Restatement (Second) of Contracts,[2] which renders "equivalent to a misrepresentation" one party's failure to correct a mistake in a writing "if he knew that the other was mistaken as to its contents or as to its legal effect." (POO at 6). However, it is clear from the context of the trial court's Phase One Opinion that this proposition of law was not recited for the purpose of making a fact finding of inequitable conduct on the part of Asoma but, rather, that it was intended to instruct, albeit erroneously, that in such circumstances as those addressed in this section of the Restatement, Western's negligence in failing to discover its alleged mistake did not preclude reformation. (Id.).

2. Western failed to establish that Asoma had knowledge of the alleged mistake before the execution of the contract.

The only finding of fact from which one can presume to infer that Asoma ever knew that Western "was mistaken as to [the] contents or as to [the] legal effect" of any document is reflected in the last sentence on page 4 and the first sentence on page 5 of the trial court's Phase One Opinion. There the trial court writes, "King knew from his earlier conversations with Cerny [Western's Land and Legal Manager] that Western believed the contract provided the reclamation obligation to be his. King knew that the Quitclaim Deed was drafted to the contrary." (POO at 4-5).

It is clear from the date established in the first full paragraph preceding these quoted sentences that the trial court was

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[2] As discussed at length in AOAB at pages 32-36, the trial court erred in its reliance on this section of the Restatement.

writing about a time before March 16, 1989. (See POO at 4). But it is not clear when. It is, however, also clear from the entire record and especially from the uncontroverted testimony of Mr. Cerny, the man whom the trial court found to be the most credible of all witnesses at trial, that Mr. Cerny had never discussed reclamation or the critical language of Paragraph 3 of the Quitclaim Deed with Mr. King at anytime before the Contract was executed on June 30, 1988. (TI:1062-25 to 1064-1; TI:1394-8 to 13; POO at 3). Moreover, the record is clear that Mr. King had no communication about Paragraph 3 with anyone else at Western at anytime prior to the making of the Contract on June 30, 1988. (TI:739-17 to 740-1; TI:753-5 to 8; TI:903-11 to 16; TI:1394-8 to 13). Therefore, prior to the making of the Contract, Asoma had not learned from Mr. Cerny, or for that matter from anyone else, that the Quitclaim Deed contained a mistake, much less a mistake of which Western was unaware.

According to the undisputed record and the trial court's own findings of fact, any awareness that Asoma might have acquired about any such mistake came after the Contract had been executed on June 30, 1988. This is confirmed at page two of the trial court's Phase Two Opinion. (Compare POO at 4 and 5 and PTO at 2). At best, when all of the trial court's actual findings of fact are taken together, it can be said that the trial court found that after the Contract had been fully executed on June 30, 1988, Asoma became aware that the Contract had made Western responsible for reclamation -- the so-called drafting mistake, and that with such

knowledge, Asoma participated in the closing of the transaction on October 12, 1988. However, the trial court never found that Asoma had failed to disclose the so-called mistake to Western prior to the closing. Indeed, any such finding would have been clearly erroneous and completely unsupported in the record.

3. Prior to the closing, Asoma specifically advised Western of Western's reclamation obligations under the Contract.

The essential fact is indisputable that prior to the closing, Mr. King had specifically advised Western of the so-called mistake in the language of the Quitclaim Deed. (See POO at 3). More particularly, on August 23, 1988, nearly two months before the closing, Mr. King explicitly informed Western that the Contract made Western, and not Asoma, responsible for all of the reclamation of the Drum Mine. (Ex. 37; Ex. U-2; TI:756-16 to 758-1; TI:1160-18 to 1163-5; TI:1165-5 to 1166-7; TI:1210-18 to 23). Mr. Cerny's own notes regarding that conversation clearly reflect that Mr. King had advised Mr. Cerny that the Contract did not make Asoma responsible for reclamation and that Asoma was not responsible for replacing Western's reclamation bond. (Ex. U-2; TI:1397-1 to 1399-25; TI:1165-5 to 1166-10; TI:1291-7 to 1292-4). In this regard, it is important to note that Mr. Cerny testified that he did not think that Mr. King was trying, during this conversation, to hide the fact that the Contract had made Western liable for all reclamation. (TI:1399-3 to 25).

Regardless of how this communication is interpreted and evaluated, it is indubitable that on August 23, 1988, well before the closing, Asoma had apprised Western of the existence of the so-

called mistake in the Contract and thereby fully discharged any conceivable disclosure obligation that it may have had under Comment e. of § 161 of Restatement (Second) of Contracts. However, Asoma hastens to add that it had no such obligation.[3] It is also indubitable that, after having been specifically put on notice by Asoma on August 23, 1988, Western made absolutely no effort whatsoever to correct the so-called mistake in the Contract or to entirely avoid the Contract, as it could easily have done,[4] either before Asoma had exercised its option on September 28, 1988 or before the transaction closed on October 12, 1988. (TI:763-4 to 764-6).

During the ninety-day due diligence period following the execution of the Contract on June 30, 1988, Asoma learned of the existence of several violations of Western's operating permits at the Drum Mine. (TI:587-25 to 590-11; POO at 2; PTO at 2 and 3). In particular, Asoma learned that Western had illegally constructed and operated six of its ten leaching heaps without having obtained the legally required governmental permits from the Bureau of Water Pollution Control, Utah Department of Health. (Ex. 33; TI:586-2 to

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[3] It is a general principle of law that "one is not bound in law to disclose in the treaty for a contract all known facts which may be material to the other party's judgment, nor even to remove a mistake not **induced** by one's own act." Frederick Pollock, Et al., Principles Of Contract At Law And Equity 650 (Samuel Williston ed., 3d ed. 1988). It is further revealing that in land transactions, courts will make a rare exception to this general rule in an effort to protect the **Buyer** of land from the **Seller's** failure to disclose or from the **Seller's** improper description of the land. Pollock at 662, et seq.

[4] See the discussion infra at page .

590-11; TI:566-12 to 19). Asoma also learned that Western, in an effort to avoid the possibility of substantial fines and possible criminal prosecution for such misconduct, had negotiated and entered into an agreement with the State of Utah to immediately cease operations on the six illegal heaps and to discontinue using the remaining four heaps effective October 1990. (Ex. 35; Ex. D-3; TI:593-1 to 19; TI:596-24 to 598-7). Western's deal with the State had disastrous effects upon the potential profitability of the Drum Mine. (See Ex. Z-2; Ex B-3).

4. With full knowledge of its contractual reclamation responsibility, Western reaffirmed the Contract.

Based upon Mr. King's belief that Western had misrepresented the legal status of the Drum Mine, and because of his concern that the potential profitability of the Drum Mine had been greatly reduced by the foregoing events, Mr. King sent a letter to Western's President, Arden "Buck" Morrow, dated September 19, 1988, by which Mr. King attempted to renegotiate the purchase price of the Drum Mine or to avoid the Contract in exchange for Western's return of Asoma's option payment of $30,000. (Ex. Y-2; Ex. Z-2; TI:60-24 to 61-10; TI:755-1 to 757-17; TI:764-7 to 766-17; TI:1179-5 to 1182-12). On September 21, 1988, Buck Morrow wrote Mr. King a letter of response in which he refused to renegotiate the purchase price or to avoid the Contract and refund Asoma's $30,000, stating, **"We recommend adhering to the terms of our agreement as originally written."** (Ex. A-3; TI:1183-11 to 1182-2; TI:1185-12 to 1186-2). Two days later, after Mr. King had written another letter to urge Mr. Morrow to reconsider Western's position, Mr. Morrow

responded with a letter that reiterated his earlier position. (TI:1186-3 to 1188-10; Ex. B-3; Ex. C-3).

All of the foregoing evidence was uncontested and demonstrates conclusively that, contrary to the implication of the trial court (POO at 6), Asoma did not misrepresent by non-disclosure.[5] It further demonstrates that Western was extremely negligent in failing to correct its error and that Western waived any claimed entitlement to reformation.

II. WESTERN'S NEGLIGENCE IN DRAFTING AND REVIEWING THE CONTRACT BARS ITS CLAIM FOR REFORMATION.

It is well settled that "'[e]quity will not relieve a person from his erroneous acts or omissions resulting from his own negligence.'" Denver & S.L. Ry. v. Moffat Tunnel Improvement Dist., 35 F.2d 365, 372 (D. Colo. 1929), *aff'd and modified,* 45 F.2d 715 (10th Cir. 1930), *and cert. denied,* 283 U.S. 837 (1931). Mistake within the meaning of equity, is a false belief **induced** by a misunderstanding of the truth **without negligence.** Id. Furthermore, "where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, **or waives an investigation after his attention has been called to it,** it is not a mistake within the legal sense. Id. (emphasis added). Moreover, even in the case of an actual misrepresentation, a party may not have the right to rely on such misrepresentation when "he could have learned the truth by reasonable inquiry." See M.D.C./Wood v.

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[5] Indeed, it is clear from the undisputed facts that the only party guilty of misrepresentation by non-disclosure is Western. See infra at pages 14-20 and AOAB at 32-33.

Mortimer, 866 P.2d 1380, 1382 (Colo. 1994). A party may lose his right to reformation where he is guilty of negligence. Cf. Mike Occhiato Mercantile Co. v. Allemannia Fire Ins. Co., 98 F.Supp. 888 (D. Colo. 1951).

When a unilateral mistake occurs as the result of one's own negligence or inexcusable neglect, reformation will be denied. Tayyara v. Stetson, 521 P.2d 185, 189 (Colo. Ct. App. 1974). Western's failure to use due diligence in carefully reading before signing the Contract that it had prepared was so negligent as to bar reformation. Id.; see also, Work v. Wagner, 76 Colo. 407, 231 P. 1110 (1925). Certainly, the trial court's own finding that Western's negligence was "remarkable" (POO at 6), i.e., that it was extraordinary, demonstrates conclusively that Western had failed to exercise due diligence prior to the execution of the Contract and even after the time that Asoma had made Western aware of the so-called mistake in Paragraph 3 of the Quitclaim Deed. Based upon the trial court's fact findings, it is clear that the trial court erred as a matter of law in granting reformation.

The trial court found that Western had made a "remarkable mistake" in drafting and repeatedly reviewing, discussing and scrutinizing Paragraph 3 and then signing the Contract of which it was a part. (POO 6). When considered in the light of all of the trial court's findings and all of the undeniable documentary and testimonial evidence that was elicited from Western itself regarding this "remarkable mistake," the conclusion is inescapable

that Western's conduct was irresponsible in the extreme and that its application for reformation should have been barred.

The trial court's failure to come to this legal conclusion because of its misplaced reliance on Powderhorn Constructors, Inc. v. City of Florence, 754 P.2d, 356, 361 (Colo. 1988), was plain reversible error. In this regard, it is simply unbelievable that Western can contend, without citation to any proper authority, that Colorado generally adheres to the Restatement's rule of fault. (WARB at 21-22). To this end, Western simply resubmits Powderhorn -- a public bidding case upon which the trial court rested its erroneous legal conclusion. Although the Court in Powderhorn mentions the Restatement Second of Contracts, section 157 in a footnote, the Court is careful in stating that its good faith standard of care is strictly limited to the rescission of miscalculated bids made on public construction projects. Id. at 363.

It is further revealing that since it was decided in 1988, Powderhorn has never been cited for the proposition for which it was offered by Western and embraced by the trial court. In fact, the only Colorado citation to the coinciding headnote involves a case in which the Court held that while the intent of contracting parties may be determined by reference to separate ancillary instruments, this is not the rule when, as here, the contract itself is fully integrated and the terms are unambiguous. Maryland Casualty Corp. v. Formwork Services, 812 F.Supp. 1127, 1128 (D. Colo. 1993).

It is critical to recognize that Western's "remarkable mistake" was not a one-time drafting oversight by some inexperienced lay person in preparing or signing a contract but, rather, the result of a concerted and continuing effort by the president, the Land and Legal Manager and the expert mining attorney of Western, a major mining company owned by the multinational, worldwide construction firm of S.J. Groves & Sons Company. (TI:8-6 to 9-1; TI:99-8 to 100-21; TI:107-22 to 108-22; TI:973-8 to 976-1). These men were neither uninitiated "scriveners" nor neophytes. In fact, they were very experienced, highly knowledgeable and sophisticated businessmen. (TI:49-7 to 16). Simply put, they knew, or should have known, what they were doing. Moreover, in dealing with Mr. King, they were dealing with an individual who, although careful, deliberate and experienced in his own right, was not represented by counsel in the contracting process that led to the Contract of June 30, 1988 and was not personally present at the closing on October 12, 1988. (TI:164-2 to 9; TI:237-12 to 18; TI:742-19 to 743-11; POO at 1 and 4).

By way of excuse for Western's so-called "mistake,"[6] Western asserted at trial that in a telephone conversation on June 2 or 3,

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[6] Even if Western had not been extremely negligent, its application for reformation should, nonetheless, have been barred by its own simple negligence, i.e., its failure to exercise reasonable diligence in contracting. Smith v. Whitlow, 129 Colo. 239, 268 P.2d 1031; Muchow, 100 Colo. at 62, 65 P.2d at 704; Moffat, 35 F.2d at 372. And this is so because Western's "mistake" was not excusable action or inaction but inexcusable negligence. See Moffat at 372, citing Pomeroy on Equity, vol 2, 1707 (mistake within the meaning of equity, is a false belief induced by a misunderstanding of the truth **without negligence**.).

1988, Buck Morrow, had negotiated an "understanding" with Mr. King pursuant to which Asoma would become responsible for all reclamation at the Drum Mine. Although the trial court apparently found that such an antecedent understanding had been achieved on June 2 or 3, 1988, the evidence upon which it necessarily had to rely was so plainly unclear and equivocal as to disallow the finding of the trial court as a matter of law.[7] See Segelke v. Kilmer, 145 Colo. 538, 542, 360 P.2d 423, 426 (1961) (emphasis added); see also the discussion of the evidence in AOAB at pages 6 to 14. For example, Buck Morrow's notes of this alleged oral understanding were incomplete, unspecific, undated and untitled even as to subject matter and parties, and the trial court itself found them to be "cryptic". (Ex. 6; POO at 2). Significantly, Buck Morrow failed to show these "cryptic notes" to anyone at Western, including all of Western's several attorneys and Western's point man in the contracting process, its Land and Legal Manager, Alan Cerny. (TI:275-6 to 21; TI:276-1 to 277-24; TI:282-6 to 10). Buck Morrow's testimony is no less "cryptic" than his notes. He testified that he "assumed" that Mr. King had agreed to accept undescribed and unlimited liability for all reclamation at the Drum Mine, having first acknowledged that he himself was unaware of what that might entail. (TI:176-23 to 178-13; TI:183-19 to 185-25).

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[7] There is no legally cognizable support in the record for the trial court's finding of an antecedent oral understanding regarding reclamation. And this would hold true even if the trial court had completely rejected all of the evidence presented by Asoma and had accepted as true all of the evidence presented by Western.

However, he couldn't remember anything, not even a single word, of what he or Mr. King may have said about the crucial issue of reclamation or even, within a period of six months, when the alleged deal was actually made.[8] Moreover, Buck Morrow clearly confirmed that he had never negotiated the subject of reclamation with Mr. King. (TI:177-23 to 178-; TI:739-11 to 740-6).

It is also very significant that although the trial court appears to have relied upon such muddled and intrinsically dubious evidence,[9] and went so far as to characterize it as "clear and unequivocal" and even "indubitable" (POO at 5), the trial court completely ignored and failed even to mention the following indubitable facts: Nearly three weeks after Buck Morrow and Mr. King had supposedly reached an alleged oral "understanding" regarding reclamation, Western drafted and submitted to Mr. King at least two drafts of an integrated contract proposal containing a previously undiscussed provision regarding indemnification, a previously undiscussed provision regarding hold harmless and a

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[8] See Asoma's Opening Answer Brief, at footnotes 2 and 3.

[9] For example, the trial court cited several documents generated by Mr. King and Utah State authorities to confirm its fact finding that Mr. King had agreed to accept reclamation. (See POO at 3-5). However, none of these documents confirms anything other than that the State of Utah regarded any applicant for a permit to operate a mine as the party responsible for reclamation. Western's expert Michael Keller, Esq. testified to as much. (TI:470-2 to 16). Indeed, Mr. Keller testified that vis a vis the State, by making an application for a mining permit, an applicant became responsible for reclamation as a matter of state statute. (TI:454-20-24). Significantly, Mr. Keller also testified that regardless of who the State might identify as the party responsible for reclamation, sellers and buyers were free to and usually did negotiate such responsibilities between themselves. (TI:470-18 to 24).

previously undiscussed supercessionary clause by which Western officially, clearly and unequivocally put Mr. King on notice that **"all previous and contemporaneous agreements, representations, warranties, or understandings, written or oral"** were canceled.[10] (Emphasis added in bold; Ex. 2 at 4). Without any change in language, each of these previously undiscussed provisions became part of the Contract of June 30, 1988. (TI:1123-6 to 12). The record demonstrates incontestably that Mr. King carefully read, understood, accepted and relied upon the language of the entire Contract, including, without limitation, the previously undiscussed supercessionary clause and the previously undiscussed indemnification and hold harmless provisions, and that he never discussed any of these provisions with anyone prior to the time that he and Western executed the Contract on June 30, 1988. (TI:752-12 to 753-19; TI:815-12 to 816-1; TI:1062-25 to 1064-1; TI:1136-25 to 1138-1; TI:1144-14 to 1147-1). In short, he accepted all of these clear, unambiguous and previously undiscussed provisions at face value and relied on them in executing the Contract.[11] Mr. King never believed that the Contract contained a mistake. (TI:753-15 to 19). On the contrary, he knew only that the Contract which had been prepared solely by Western and its

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[10] See the text and discussion of the supercessionary clause in Asoma's Opening Answer Brief, at pages 3, 38-39.

[11] Mr. King understood and accepted the indemnification and hold harmless language that had been newly proposed by Western as the first and, from his point of view the final, effort by Western to "negotiate" the subject of reclamation. (TI:739-7 to 741-23; TI:753-5 to 19). See the discussion of this topic at AOAB at 15.

CERTIFICATION OF SERVICE

I **HEREBY CERTIFY** that on the date and from the place shown below, a true and correct copy of the foregoing **REPLY BRIEF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS ASOMA AND JUMBO** was served by ordinary, first-class U.S. Mail upon LEE D. FOREMAN, ESQ., HADDON, MORGAN & FOREMAN, P.C., 150 EAST TENTH AVENUE, DENVER, COLORADO 80203, attorney for appellant.

DATED: JULY 15, 1996
MORRISTOWN, NEW JERSEY

Z. LANCE SAMAY, ESQ.

FINALREP.LY

staff of attorneys and advisors and presented to him as a formal offer to contract was acceptable to him as written. Among other reasons, this was so because he never agreed to blindly assume any, much less all, of Western's pre-existing, unknown and unlimited potential liability for reclamation. (TI:176-23 to 178-13; TI:530-11 to 20; TI:531-15 to 17; TI:738-6 to 16).

While Mr. King was careful in contracting, Buck Morrow was not. Mr. Morrow supposedly didn't read the drafts of the million-dollar Contract that he had asked Western's attorneys and legal advisors to prepare, and he only "skimmed" the Contract that he had signed on June 30, 1988. (TI:266-7 to 18). Moreover, prior to signing the Quitclaim Deed on October 12, 1988, Mr. Morrow says he failed to even read it. (TI:272-9 to 274-5). Coincidentally, prior to the signing of the Contract on June 30, 1988, Mr. Morrow also failed to advise Mr. King that Western had been operating illegally in the State of Utah. Mr. Morrow failed as well to advise Mr. King that 60 percent of Western's gold ore heaps at the Drum Mine did not have valid legal permits, he failed to advise Mr. King that contrary to Western's permit obligations, Western had failed to set aside $250,000 to $500,000 of topsoil to reclaim the Utah land that Western had disturbed, and he failed to advise Mr. King that Western knew that its pre-existing reclamation obligations alone had a price tag of approximately one-half million dollars. (Ex. D-3; Ex. 32; Ex. 33; Ex. 35; TI:566-12 to 19; TI:583-10 to 584-12; TI:586-2 to 590-11; TI:593-1 to 19; TI:596-24 to 598-7; TI:732-6 to 10). However the trial court may have viewed

these misrepresentations by non-disclosure during the contracting process in this case, it is certainly clear that Western's conduct does not suggest any reasonable view that Western had acted in good faith with a sense of fair dealing.

Mr. Reeves, the experienced mining attorney who prepared Paragraph 3 of the Quitclaim Deed and the Contract of which it was an integral part read, reviewed and re-reviewed Paragraph 3 several times and concluded that the one sentence which imposed reclamation liability on Western couldn't be clearer. (Ex. I-2; T1:40-17 to 41-15; TI:47-9 TO 48-9; TI:1126-8 to 18). Perhaps the most telling testimony given by this seasoned mining law expert was his statement that he didn't "think anyone would agree to indemnify [Western for its pre-existing permit violations]." (Ex. I-2; TI:41-14 to 43-6; TI:1131-3 to 20). Mr. Reeves was correct, for it is preposterous to believe that Mr. King, or anyone else, would be so foolish during a preliminary telephone conversation to assume absolute unlimited liability and the potential loss of millions of dollars for the reclamation of a mine that had been worked over by a large mining corporation for many years. (TI:100-4 to 102-20).

Mr. Cerny testified that he never discussed reclamation with Mr. King prior to the execution of the Contract on June 30, 1988. (TI:1062-25 to 1064-1; TI:1394-8 to 13). He also testified that he made contemporaneous notes of his June 7, 1988 conversation with Buck Morrow regarding the terms of the alleged deal that Mr. Morrow had made with Mr. King and stated that those notes "made no mention of any discussion of reclamation," much less that Mr. King had

accepted it. (See Ex. G-1). Mr. Cerny also testified that he read all of the drafts of the Contract, re-read them, reviewed them, and scrutinized them with Mr. Reeves. (TI:1053-24 to 1054-9; TI:1057-6 to 1059-3; TI:1122-3 to 1123-5; TI:1126-9 to 18; TI:1129-1 to 18). Indeed, on several occasions, Mr. Cerny went so far as to underline and place stars next to the solitary sentence of Paragraph 3 which obligated Western to retain responsibility for the reclamation of its past disturbances of the Drum Mine. (See Appendices 3, 4 and 5 of AOAB; Ex. I-2 at folio S102386-17; Ex. 0-2 at folio 102873). The repeated and colorful highlighting of this solitary sentence amply demonstrates Western's acute awareness of its reclamation obligations.

Western now continues its attempts to disavow its contractual duties and incredulously asserts that Mr. King blindly accepted all reclamation liability for Western's past disturbances, including all its permit violations, at a point in time when the parties had not even begun the intense and extensive negotiations that had to be conducted concerning leases, permits, equipment, mining claims, water rights, royalties, etc. (See AOAB at notes 9-11).

The trial court observed that Western "looked but failed to see." However, Buck Morrow testified that he only "skimmed" the Contract and that he didn't even bother to read the Quitclaim Deed. (TI:266-7 to 13; TI:272-9 to 274-5). Apparently, he failed to see because he didn't look. Attorney Reeves and Land and Legal Manager Cerny, read, re-read, reviewed, analyzed, discussed, underlined, starred, and scrutinized the last sentence of Paragraph 3 over and

over again, and supposedly didn't see the alleged mistake that they had made in formulating the language of that sentence. That they did not see, simply defies credulity. More, it demonstrates such extreme negligence that reformation should have been barred as a clear matter of law.

III. WESTERN'S ACCEPTANCE OF BENEFITS UNDER THE CONTRACT AND ITS ACQUIESCENCE IN THE TERMS OF THE CONTRACT CONSTITUTE A WAIVER OF ANY REFORMATION CLAIM.

Waiver may be implied when a party engages in conduct which manifests intent to relinquish a right or privilege, or acts inconsistently with its assertion. Tripp v. Parga, 847 P.2d 165, 167 (Colo. Ct. App. 1992). Waiver may be shown by a course of conduct signifying a purpose not to stand on a right, leading one, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. Pastor v. San Juan Sch. Dist., 699 P.2d 418, 420 (Colo. Ct. App. 1985).

"Acquiescence in a contract after learning that it does not represent the parties' actual agreement destroys the right of reformation either on the ground of mutual mistake or on the ground of fraud . . . even though the conduct of the opposing party be termed unconscionable." Kelley v. Silver State S & Loan Ass'n., 534 P.2d 326, 328 (Colo. Ct. App. 1975) (emphasis added). A party to a contract cannot both affirm and disaffirm it, in whole or in part (as for example in this case where Western accepted all of Asoma's one million dollars and then sought to rewrite the terms of the Contract pursuant to which Asoma paid that million dollars). Id. If such duplicity were allowed, parties would be encouraged to

speculate upon the advantages or disadvantages of an agreement, receive its benefits, and thereafter repudiate its obligations. Id. Whether one characterizes Western's acts as waiver or ratification, the result is the same. Id.

While waiver is generally a question of fact, it becomes a question of law if, as here, the facts are undisputed and clearly established. Id.; see also Sung v. McCullough, 651 P.2d 447, 449 (Colo. Ct. App. 1982) (where the material facts are not disputed, the determination of whether there has been waiver is a matter of law). Notwithstanding, Western cites to Tripp to support its unfounded contention that no waiver occurred. However, the facts of Tripp are readily distinguishable because in Tripp the Court found that the Contract had been repudiated and that there was no "known" right to intentionally relinquish. Id. at 167-78.

By contrast, in this case the Contract had not been repudiated and Western had been specifically made aware of the so-called mistake in the Contract. With complete knowledge of this fact, and in the face of an offer from Mr. King to walk away from the deal, Western affirmed the deal, accepted every cent of Asoma's one million dollars, and thereby intentionally relinquished any contested "known rights" under a valid Contract. See Nationsbank of Georgia v. Conifer Asset Management LTD., 1996 WL 154463, at *3 (Colo. App. April, 1996) (under certain circumstances, waiver may be inferred from acceptance of payments without reservation).

Finally, nearly a year after the Contract had been made and more than eight months after the closing, on May 18, 1989, Western

informed Asoma of its discovery[12] of the so-called mistake in the Contract. See Sung, 651 P.2d at 449 (53 days without objection constitutes waiver). It is respectfully submitted that Western waived any arguable entitlement to reformation.

---

[12] Despite Mr. King's August 23, 1988 disclosure to Mr. Cerny concerning Western's reclamation responsibility under the Contract, Western alleged that on February 24, 1989, it discovered, for the first time, the alleged "error" in the Quitclaim Deed and Assignment. (Ex. 4; Ex. Q-3; TI:1232-5 to 14). Curiously, Western did not notify Asoma of the error at the time -- which would have been the logical course of action had the error truly been a "mistake." (TI:782-12 to 783-20; 1267-16 to 1270-1). In fact, Western did not notify Asoma of the alleged error until May 18, 1988, nearly three months after the alleged "discovery." (TI:1235- 24 to 1236-16; 1243-16 to 1244-11), During the interim, Western embarked on a "strategy" (Ex. U-3, para. 2) that was designed to inveigle Asoma into a position which would enhance Western's ability to effectuate a change in the Quitclaim Deed without directly raising the issue. (TI:1246-18 to 1247-6; TI:1250-10 to 24).

In March, Western arranged for its accountants, Peat Marwick, to telefax an "audit letter" to Mr. King. (TI:783-21 to 784-1; Ex. A-4). In addition to the customary financial verifications that are requested in such letters, the audit letter asked Mr. King to confirm, certain facts relating to the sale of the Drum Mine. (Ex. A-4). The audit letter contained an ambiguous and misleading paragraph which purported to describe Paragraph 3 of the Quitclaim Deed. (TI:785-9 to 787-3). Specifically, the audit letter recited that "pursuant to the indemnity provisions contained in the Quitclaim Deed," Asoma had assumed responsibility for "all reclamation costs." (Ex. 62; Ex. A-4). Focusing on the words "pursuant to the terms of the Quitclaim Deed," and treating the request as a routine bookkeeping matter, Mr. King signed the letter, literally within minutes after it had been placed on his desk, and returned it to Western's accountants as urgently requested. (TI:784-2 to 24; TI:785-8 to 787-3).

On March 27, 1989, Mr. Cerny advised Mr. Reeves that Mr. King had signed the audit letter and stated, **"I think we're getting close to initiating the corrected Quitclaim Deed & Assignment."** (Ex. A-4; TI:1266-4 to 1269-14). Despite the fact that Western's other communications with Mr. King both before and after the audit letter consistently reflect that Asoma had always disavowed reclamation obligations for Western's past conduct, Western now brandishes the audit letter as evidence of its assertion that Asoma intended to assume responsibility for all reclamation. (DP8 (Complaint at para. 41)).

IV. THE TRIAL COURT ERRED IN FAILING TO GIVE DISPOSITIVE EFFECT TO THE SUPERCESSIONARY CLAUSE OF THE CONTRACT.

In December of 1995, the Supreme Court of Colorado, sitting en banc, rendered an opinion that has a direct impact on the lower court's admission of extrinsic evidence. See Nelson v. Elway, 908 P.2d 102, 107, *reh'g denied* Jan. 16, 1996. In Elway, the Court, addressed the issue of a supercessionary clause regarding sophisticated participants in a complex commercial transaction. Having considered the complex, commercial nature of the transaction, the sophistication of the parties, the prior negotiations, the multiple drafts of the instrument, and the attorney review of the detailed document, the Court unabashedly declared that even in cases in which extrinsic evidence is ordinarily admissible to ascertain the intent of the parties, the existence of a supercessionary clause, such as the one in this case, will be "**dispositive as to the intent of the parties . . . .**" Id. at 107-08. Presumably, this ground-breaking case, which operates as an absolute bar to the admission of parol evidence in sophisticated business dealings, also applies with equal force to cases of reformation.

In "preclud[ing] consideration of extrinsic evidence to ascertain the intent of the parties[,]" the Elway Court took an affirmative step toward recognizing that there are certain contractual dealings, such as complex commercial transactions involving sophisticated participants, wherein a more realistic standard should apply to supercessionary clauses, namely, that the clause should be given its intended permanent and binding effect.

As in Elway, the Contract in this case contained an unambiguous supercessionary clause. Similarly, the Drum Mine sale was a complex, commercial transaction, and all of the participants, especially those representing Western, were "sophisticated" within the meaning of the Colorado Supreme Court's use of that word.

Understandably, the Supreme Court has now imputed to such sophisticates a higher standard of care and conduct commensurate with their knowledge and experience, especially when they are represented by expert counsel. Id. Here again, Western's sophisticated business executives and expert attorney also prepared the Contract in its entirety, and read and reviewed the supercessionary clause. They and Mr. King fully intended it to supersede all previous understandings.[13]

In short, the Supreme Court of Colorado has chosen to respect the expressed intent of sophisticated business people in lieu of substituting an uncertain judicial interpretation of all that preceded that which was designedly incorporated into a final document. Therefore, it is respectfully submitted that the trial court erred in denying Asoma's repeated objections to the admission of extrinsic evidence which contradicted the specific intent of the parties as expressed in the Contract's unambiguous supercessionary clause and by reforming the Contract rendered ambiguous what was once the clear, harmonious and unambiguous Contract expressly intended by the parties.

---

[13] Mr. Reeves testified that he specifically drafted the supercessionary clause "to supersede any previous agreements to the contrary." (TI:50-14 to 51-17).

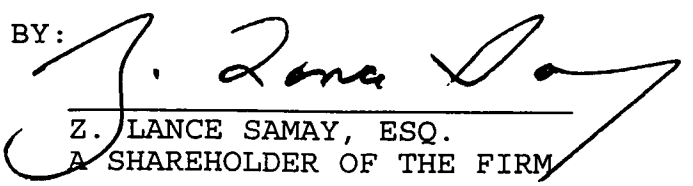
CONCLUSION

For all of the foregoing reasons, Asoma respectfully requests this Court to enter an order: (1) reversing and vacating the judgment of reformation entered by the trial court; (2) reversing and vacating so much of the final judgment that found Asoma to have been in breach of contract; (3) vacating the order of specific performance entered by the trial court regarding reclamation; (4) vacating the award of costs that the trial court entered in favor of Western; (5) affirming the trial court's denial of Western's claims for damages for breach of contract, including but not limited to the denial of Western's application for attorneys fees; and (6) remanding this action for a hearing regarding Asoma's claims for breach of contract and damages.

Respectfully submitted,

DONALD A. DEGNAN, ESQ.
NO. 20774
HOLLAND & HART
1050 WALNUT STREET, SUITE 500
BOULDER, CO 80302-5144
TELEPHONE NO.: 303-473-2715
TELEFAX NO.: 303-473-2720

Z. LANCE SAMAY
ATTORNEY AT LAW
A PROFESSIONAL CORPORATION
ONE WASHINGTON STREET
POST OFFICE BOX 130
MORRISTOWN, NJ 07963-0130
TELEPHONE NO.: 201-540-1133
TELEFAX NO.: 201-540-1020
ATTORNEYS FOR APPELLEES/
CROSS-APPELLANTS ASOMA/JUMBO

BY: 

Z. LANCE SAMAY, ESQ.
A SHAREHOLDER OF THE FIRM

DATED: JULY 15, 1996
MORRISTOWN, NEW JERSEY

ASOMA
INSTRUMENTS

ASOMA Instruments, Inc.
12212-H Technology Blvd.
Austin, Texas, USA 78727
Phone (512) 258-6608
Telex #76-7177
Telefax (512) 331-9123

FAX TRANSMITTAL COVERSHEET

DATE: SEPT 20, 1988

TO: BUCK MORROW

ATTN: WESTERN STATES MINERALS CORP

LOCATION: DENVER

FAX NUMBER: 303-425-6634

NUMBER OF PAGES THIS TRANSMISSION
(Including Cover Page) 3

FROM: E. B. KING

REFERENCE #: WSMC 919

BUCK — CALL ME AFTER YOU HAVE REVIEWED THE ATTACHED.

EBK

E0000321

DEFENDANT'S EXHIBIT
Y-2
90 CV 396

(1)

Memo to: Western States File
File: WSMC919

Sept. 19, 1988

Subject: Impact of Western's Illegal Construction of Six Heaps and failure to extend permits for first three heaps.

Based on telephone reports from Al Cerny and Al Gordon, the State of Utah has taken the following position, to be confirmed by letter, as a result of the discovery by the State that six heaps were constructed without permits, and three heaps were being leached beyond the expiration date of the existing permits:

1) All operations--leaching and stacking on all heaps--can continue until Dec. 1, 1988.

2) After Dec 1, 1988 no more stacking will be allowed on any heaps, and leaching must stop on the six unpermitted heaps.

3) Leaching can continue until Oct 1, 1990 on the permitted heaps, at which time all heaps must be taken out of service and reclaimed. (4) 1,2,3,4

Negotiations between the State and WSMC which produced the above understandings were conducted without Jumbo's participation, despite several requests by Jumbo for joint meetings.

The impact of the above, taken at face value is as follows:

1) It removes from leaching, perhaps permanently, by Dec. 1st (two months from now) 61% of the total leach-pad ore. This originally contained about 40% of the gold, and being placed last on the heaps, had the least amount of leaching time. Thus, it is estimated that as much as 2/3 of the remaining LEACHABLE gold could be made unavailable by this permit problem. It is doubtful that the removal of this low grade ore and restacking on newly built heaps for further leaching can be profitable. Operated marginally with other activities, this portion of the old heaps was estimated to contribute about $400,000 gross profit to the operation.

2) Jumbo had justified a large portion of the purchase price paid to Western on the fact that by stacking newly mined ore on top of existing heaps, the costs of constructing new heaps could be avoided. The cost of building new heaps for newly mined ore reserves from Jumbo's adjacent properties, plus that remaining on Western's properties --totally 500,000 tons @ $1.00/ton is about $500,000. This cost justification is effectively removed by the State's present position.

3) The necessity to secure new permits and then to build new heaps for newly mined ore will inevitably delay production and thus incur interest costs, as well as extend the gold market risk for at least six months and possibly as much as one year. The market risk can not be calculated; the interest cost will range from a low of $50,000 to a high of several times that amount.

E0000570

CONCLUSIONS:

Barring the development of a more favorable fact situation within the

next few days, the following courses of action by Jumbo are indicated:

a) Drop the option and demand return of the $30,000 option payment based on Jumbo's reliance on the implicit understanding that Western's operation had been conducted legally up to the time of the option (which it develops, was not the case).

b) Renegotiate the deal based on the existing fact situation. The value of the property to Jumbo now comes mostly from the existing water well (the pipeline needs replacement), the ponds, and the carbon extraction system. These can be reproduced to meet Jumbo's separate needs in a location closer to its mines (saving haulage costs) for about $250,000, or a net value of about $100,000, after taking $150,000 credit for haulage savings.

In addition there is the hope and expectation of being able eventually to make money out of remaining ore and the leaching of the first four heaps until 1990. The uncertainty of the production schedule (being delayed up to one year by permitting problems) before newly mined ores can be processed, makes hedging of the gold price of doubtful value. The expected production is probably too small to be of interest to anyone for "gold loan" purposes, thus eliminating another method of reducing market exposure. It is possible that WSMC might consider a payment in gold, delayed to accomodate the new permitting negotiations, for all or a part of its selling price.

It is obvious from the above that a substantially reduced value must be placed on the Western property, considered by itself, under the existing fact situation. However, a value, when considered together with, and incremental to, Jumbo's reserves remains. This value is presently estimated in the range of $250,000 to $500,000, depending on the attitude of the State officials as determined in the next few days.

c) Delay closing by mutual agreement, conduct joint meetings with the State in an attempt to arrive at a permit situation which would restore the ability to stack more ore on the heaps and to continute leaching for at least three years (not two years, as presently structured).

d) Other alternatives as might be suggested by WSMC.

Western States Minerals Corporation

4975 Van Gordon Street
Wheat Ridge, Colorado 80033
(303) 425-7042
TELEX NO. 450186 West States

FAX: (303)425-6634

RECEIVED
SEP 2. 1988

DATE: 9/2/88

FAX TRANSMIT SHEET

OF PAGES INCLUDING COVER: 2

COMPANY: ASOMA (UTAH) INC

FAX #: 512 - 331 - 9123

ATTENTION: Ed KING

FROM: BUCK MORROW

TIME:

MESSAGE: LETTER ON DRUM MEMO

DEFENDANT'S EXHIBIT
A-3
90 CV 396

BCC: G. REEVES

SIGNED: A.B. Morrow by APL

PLEASE NOTIFY US IF ALL COPIES DO NOT ARRIVE

100208

Western States Minerals Corporation

4975 Van Gordon Street
Wheat Ridge, Colorado 80033
(303) 425-7042
TELEX NO. 450186 West States

September 21, 1988

Mr. Ed King
Asoma (Utah) Inc.
6305 Fern Spring Cove
Austin, Texas 78730

Dear Ed:

This letter is to comment on your memo of September 18, 1988 sent to us under cover of your Fax Transmittal Sheet dated September 20, 1988.

Please be advised that, pursuant to our right to operate the Drum Mine Project, we entered into discussions with the State of Utah regarding certain permitting problems with six of the existing heaps. The discussions with the State have moved smoothly and in a expeditious manner. Even though the problem only recently came to the attention of the State and WSMC, we anticipate a more than favorable resolution by the middle of next week.

As to the various courses of action stated in your file memo, the one not stated is the most obvious which is to pay the agreed price and close as prescribed in the option agreement. WSMC has acted in good faith and has not breached the agreement. Therefore, the return of the option payment as indicated in your file memo is not a valid course of action. We recommend adhering to the terms of our agreement as originally written.

Very truly yours,

WESTERN STATES MINERALS CORPORATION

Arden B. Morrow
President

ABM/prb

100209

ASOMA INSTRUMENTS

ASOMA Instruments, Inc.
12212-H Technology Blvd.
Austin, Texas, USA 78727
Phone (512) 258-6608
Telex #76-7177
Telefax (512) 331-9123

FAX TRANSMITTAL COVERSHEET

DATE: 9/23/88

TO: Western States Minerals Corp

ATTN: Buck Morrow

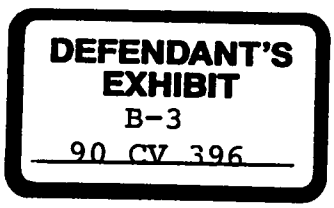
LOCATION: Wheat Ridge, Colo

FAX NUMBER: 303-425-6634

NUMBER OF PAGES THIS TRANSMISSION
(Including Cover Page) 3

FROM: E. B. King Asoma (Utah), Inc

REFERENCE #: WSMC 923



E0000326

September 23, 1988
File: WSMC923

Mr. Arden B.Morrow
President
Western States Minerals Corporation
4975 Van Gordon Street
Wheat Ridge, Colorado 80033

FAX NO. 303-425-6634

Dear Buck:

In reponse to your letter dated September 21, I have the following comments:

1) You state that the permitting problems "only recently came to the attention of the State and WSMC". For the record, the matter arose as a result of a February 2, 1988 inspection of the property by the State and WSMC was advised of the State's concern by letter dated February 12, 1988. Further, on April 27, 1988 another letter from the State of Utah concerning "unauthorized heap leach pads"...prohibited "further construction, modification to or additions to heap leach facilities".

It is my contention that you had the obligation to reveal this problem to us BEFORE we signed the Option Agreement, knowing as you did of our intentions to continue to leach all of the existing heaps (as you were doing at the time), and to add more ore on top of them from our own deposits which you had inspected during the course of our negotiations.

This matter first came to my attention on July 12th, twelve days AFTER our Option Agreement was signed (and you accepted our $30,000 "good faith deposit"), as a result of my inspection of the files in your office. I was told at the time by Charlie Gordon that this was not a signficant problem and "not to be concerned". However, the following day in Salt Lake City, I was provided copies of the February 12th and April 27th letters refered to above, and was told in no uncertain terms by the State official involved that he viewed the matter very seriously, and that the problem would have to be resolved before final consideration could be given to our application to add ore to these heaps, subsequent to our purchase of the property.

Our concern was promptly communicated to your staff. Yet, inspite of our direct interest in the resolution of your permit problems, we have been excluded from your negotiations with the State, and requested not to contact the State directly while these negotiations proceeded.

And now we find that, only seven days remaining on our Option, we still have no direct knowledge of where we or you stand on this matter.

E0000327

Please be advised that I have requested an audience with Utah Division of Environmental Health officials early next week, and will attempt to obtain this vital information directly from them. My memo sent to you Sept. 20th clearly indicates its impact on the value of your property to us.

2) As I have repeatedly advised your staff, we have been ready to close

this deal for some time now, providing that this problem is resolved so as to allow us to utilize the assets which you propose to sell to us.

3) With regard to the various courses of action open to us as stated in my memo, the one which is most obvious to you (that is, ignore the huge impact of the illegal heaps, and proceed) is way down the list for us, and thus I would invite you to again consider alternatives.

Again, I hope we can reach a mutually advantageous resolution to this serious problem.

Best regards,

Asema (Utah), Inc.

Ed King

E. B. King

Western States Minerals Corporation

4975 Van Gordon Street
Wheat Ridge, Colorado 80033
(303) 425-7042
TELEX NO. 450186 West States

FAX: (303)425-6634

DATE: 9/23/88

FAX TRANSMIT SHEET

OF PAGES INCLUDING COVER: 2

COMPANY: ASOMA (UTAH) INC.

FAX #: 512-331-9123

ATTENTION: ED KING

FROM: BUCK MORROW

TIME: 1520

MESSAGE:

DEFENDANT'S EXHIBIT C-3 90 CV 396

I.D: ABM

107590

PLEASE NOTIFY US IF ALL COPIES DO NOT ARRIVE

Western States Minerals Corporation

4975 Van Gordon Street
Wheat Ridge, Colorado 80033
(303) 425-7042
TELEX NO. 450188 West States

September 23, 1988

Mr. Ed King
ASOMA (Utah) Inc.
6305 Fern Spring Cove
Austin, Tx 78730

Dear Ed:

We have reviewed your letter of September 23, 1988. Your letter raises no new issues. Therefore, please refer to our letter of September 21, 1988 and the Option Agreement.

Very truly yours,

WESTERN STATES MINERALS CORPORATION

Arden B. Morrow
President

ABM/prb

107591